INTERNATIONAL LAW.

There is no subject in the range of judicial science possessing such intrinsic claims to attention as that of international law. The foundations on which it rests—the sanctions by which it is enforced—the difficulty of the questions involved—the magnitude of the interests concerned—all and each of these considerations affords matter for curious and most interesting contemplation. The great nations of antiquity, which have contributed most to the civilization of modern Europe, have given least to this branch of civilization. If we look at the history of the Jews we find a total absence of the sense of duty in relation to other nations. Nearly all our knowledge of international law among ancient States is derived from their intercourse with the Jews, and with the Greeks, and Romans, more particularly with the latter. Most of the rules were founded on religion. Treaties were sanctioned with solemn oaths, the violation of which it was believed would be followed by the vengeance of the gods. War between nations of the same race and religion was declared with sacred rites and ceremonies, but when once begun it was waged with little rule or check. The herald proclaimed its existence by devoting the enemy to the infernal gods. Ambassadors and heralds always possessed a sacred character.

The division of the Greek world into a large number of independent communities favored the existence of an Hellenic law of nations, presenting in many points—such as the recognition of common Hellenic customs, religious and political, and of the principle of a balance of power—a parallel to modern international law. They generally gave quarter, allowed the ransom of prisoners, respected trophies, and allowed truces for the burying of the dead; and they had a usage bearing a resemblance to the modern consular system. The *Jus Feciale* of the earlier Roman law, regulating the formal intercourse between Rome and other nations, is

indeed the germ of what might have been a system of pure international law. But the rise of the Roman republic to the mastery of the world rendered such a thing as international law unnecessary and impossible. The reason for this is clear; international law rests upon two great maxims—that nations are mutually independent and that they are equal—but the history of Rome shows the exaggerated notions of Roman superiority, and the constant aim of the Roman people to destroy all other power and independence but their own. The chronic state of war, and the lust of conquest, which mark the history of Rome, were unfavorable to the growth of anything like that friendly union among States which is productive not only of reciprocal rights and obligations, but of reciprocal esteem. When we look at the fierce spirit of conquest amongst the Romans, and their barbarous international customs, such as is to be found in their haughty triumphs, in their gladiatorial shows, when wretched captives were "butchered to make a Roman holiday;" in the barbarous doctrine of law maintained even in Justinian's time, that prisoners of war became slaves *jure gentium*, and that the consequence of captivity, even in time of peace, was slavery and loss of property; it can scarcely be said that modern international law is derived from ancient Rome. In the midst of these barbarous customs, there were, however, some redeeming features, such, for instance, as the allowing prisoners of war to purchase their freedom, and selling them only when unransomed, and from this practice, in the course of time, grew up the more humane custom of allowing the exchange of prisoners. Captives were not maltreated by the Romans, as the Athenians were at Syracuse by Greek conquerors, with the exception of kings and generals, who were, at least in Cicero's day, butchered without mercy, after having been led in triumph through the city. Nor did the Romans entirely deprive the inhabitants of the conquered country of their lands; they allowed them to retain some small portion, on the condition that they paid rent for the same as tenants (*coloni*). But of a system of law which conceived of States as the subjects of rights and duties, as members of a community of nations, the pol-

ished and elegant jurisprudence of antiquity furnishes hardly a trace. In the same consummate code which still rules the most complex relations of life with a wisdom and justice, which modern culture has hardly been able to improve, stand side by side the high morality of a completed system of equity jurisprudence, and the savage doctrine that strangers are enemies, and that with enemies war is eternal. Amid such relations of States, there was no place for law. But when from the Christian doctrine of the brotherhood of man, the inevitable corollary of the brotherhood of nations was deduced, a body of law to govern this new community followed as an inevitable consequence. It grew slowly at first, for the age was technical, and dynastic interests long absorbed the cares of statesmen. Scholiasts and commentators denied that there could be a law of nations, for where was the superior authority to enact it? It was difficult for lawyers to conceive of law without a tribunal to enforce it. Princes refused to admit that any rules restrained the prerogatives for which they claimed divine origin. Mr. Ward (in his "History of the Law of Nations," vol. I. 322–328) enumerates five institutions existing about the period of the 11th century which made a deep impression upon Europe, and contributed in a very essential degree to improve the Law of Nations. These institutions were the feudal system, the concurrence of Europe in one form of religious worship and government, the establishment of chivalry, the negotiations and treaties forming the conventional law of Europe, and the settlement of a scale of political rank and precedency.

The spirit of chivalry encouraged high sentiments of honor and fidelity, and gave a moral sanction to the observance of treaties, and rendered fraud and unfair advantage over a rival unworthy of the true knight; it threw a lustre over the defence of the weak and unprotected; and it cultivated humane feelings towards each other among the rulers of society. Chivalry dictated humane treatment to the vanquished and courtesy to enemies. The influence of Christianity was very efficient towards the introduction of a better and more enlightened sense of right and justice among the governments

of Europe. Indeed, as Laurent says, the idea of a system of international law is due to Christianity. For how could there be any legal tie between man as an individual and men as people and nations until the consciousness of a common nature was acknowledged; until the gulf which separated the free man from the slave was filled up; until the contempt for or hatred of the stranger as barbarian or enemy was removed; until man's nature was changed, and war ceased to be regarded as a glorious pastime, or an ordinary occupation, and until an equitable system was substituted for one huge overgrown empire ever striving to draw all neighbors within its grasp and to maintain unlimited rule? (*Histoire du droit des gens.* Laurent, Tome iv. libre iii. ch. 1). Christian nations were bound together by a sense of common duty and interest in respect to the rest of mankind. The history of Europe, during the early periods of modern history, contains many cases to show the authority of the Church over turbulent princes and fierce warriors, checking violence and introducing a system of morals which inculcated peace, moderation and justice. The government of the Church by a monarch, who gradually gained great political power, the presence in Europe of an ultimate interpreter in questions relating to religion and morals, no doubt did a great amount of good as well as a great amount of harm. All important questions of politics had some sort of bearing on religion, which could bring them up for examination and settlement before the Roman Pontiff; and the very vagueness of the theory of papal interference aided its success on favorable occasions. Innocent III. said: "*Nos secundum plenitudinem potestatis de jure possumus supra jus dispensare.*" (C. 4 x. *De concessione præbendæ.*) The oath of fealty was the moral ligament of society, but the Roman Pontiffs claimed the right to release vassals from their oaths of allegiance on the ground that kings and princes who were disobedient to the Church might be excommunicated, and that excommunicated persons ought not to rule over Christians. The popes acted as arbitrators between prince and prince, and between prince and people; they protected the weak against the strong, and right against might. The prin-

ciple grew up that disputes between nations should be decided according to law and Christian morality, and that war, when inevitable, should be conducted according to recognized rules laid down in the interest of humanity.

The influence of treaties, conventions, and commercial associations helped greatly to form the modern code of public law. The rights of commerce began to be regarded as under the protection of the Law of Nations. Efforts were made, upon the revival of commerce, to suppress piracy and protect shipwrecked property. Pillage had become an inveterate moral pestilence. Papal bulls and the excommunication of the Church were not powerful enough to put an end to these evils. Conventions and treaties between sovereigns, on the revival of commerce, contributed gradually to suppress this criminal practice by rendering the regulations on the subject a part of the Law of Nations. But it was reserved, says Valen, to the ordinances of Louis XIV. to finally extinguish this species of piracy by declaring that shipwrecked persons and property were placed under the special protection of the crown, and the punishment of death, without hope of pardon, was pronounced against the guilty.

Such was the Law of Nations when Grotius lived (A. D. 1625). It had been reduced to some degree of science and civility by the influence of Christianity, the study of Roman law, and the spirit of commerce. But it was still in a state of great disorder, and its principles were little known and less observed. It consisted of a collection of undigested precedents, without order or authority. The work of Grotius, *De Jure Belli et Pacis*, published in 1624, definitely laid down the foundation of the science of international law, and his work was shaped in imitation of the institutional treatises of Roman law. The object of Grotius was to correct the false theories and pernicious maxims, which then existed, by showing a community of sentiment among the wise and learned of all nations and ages in favor of the natural law of morality. He also endeavored to show that justice was of perpetual obligation and essential to the well-being of every society, and that the great commonwealth of nations stood in need of law, the

observance of faith, and the practice of justice. His idea was to digest in one systematic code the principles of public right, and to supply authorities for almost every case in the conduct of nations. Thus he had the honor of reducing the Law of Nations to a system, and of producing a work which has been resorted to as the standard of authority in every succeeding age. He is, therefore, justly entitled to be called the father of the Law of Nations.

The general desire of mankind that the mutual conduct of nations should be governed, or at least directed, by recognized rules—that there should be some principles to be invoked by the weak, and yielded to without humiliation by the powerful —has produced, indeed, a literature in international jurisprudence exceeding in magnitude that which has been employed on any other branch of the moral sciences. Many of the writers have been remarkable for sagacity, and almost all have been men of diligence and learning, and devoted to the subject of their labors. By the term international law, is meant that collection of rules, customary, conventional and judicial, which are accepted as binding *inter se* by the civilized nations of the world. International law lays down rules to be observed in the mutual dealings of nations, which are at peace with each other, and of nations which are at war with each other; and it determines the rights and duties of belligerent and neutral nations. But the rules of international law which relate to war are more voluminous and certain than those which govern nations in time of peace. International law as a whole is capable of being very differently interpreted according to the point of view from which it is regarded, and its rules vary infinitely in point of certainty and acceptance. By some jurists it is considered improper to speak of these rules as laws; they are merely moral principles, as they are destitute of the sanctioning force which is the distinguishing quality of law proper. Whilst other jurists derive its principles from some transcendental source, such as nature, the Divine will, reason, etc., and these do not hesitate to attribute to its rules an intrinsic authority over all the nations of the world. According to this theory, the usage of nations is evidence of, but not

the origin, of the law. It merely expresses the consent of nations to things which are naturally—that is, by the law of God—binding upon them. There is, however, no legislative or judicial authority recognized by all the nations of the world that regulates the reciprocal relations of States, and consequently no express laws, except those which result from the conventions which States may make with one another. So that, however long established or useful any or all of these rules may be, there is but one real remedy for their infraction, and that remedy is the sword. True, public opinion may be and often is appealed to with considerable force, in cases of violation of international morality, yet such appeal is not always attended with success, and at the best it affords but a precarious defence against the acts of powerful nations. The foundation, therefore, upon which international law rests is the consent of nations.

The rules of human conduct to which the word "Law" is applied are thus classified by Locke, (1) The Divine law; (2) The Civil law; and (3) The Law of Opinion or Reputation. The law of nations may be divided into, firstly, the rules of international conduct which we believe to be commanded by the Deity, and which may be called the Divine law of nations, the natural law of nations, or more concisely, international morality; and, secondly, the rules of conduct which are dictated or permitted by the public opinion of nations, and which may be called the human, the actual, the secured, or the positive law of nations. To avoid the confusion incident to the use of one word to express rules of conduct often different, both in themselves, and in their sources, it will be as well to style the Divine or natural law of nations, *International Morality;* and confine the term *International Law* to the rules of conduct, whether consistent or not with international morality, which are sanctioned by the public opinion of nations. A passage in the work of Hobbes' *De Cive*, appears, from the constant reference to it by subsequent writers, to have had an extensive influence on the theory of international morality. In that passage Hobbes affirms, that organized nations assume the personal characters of men, and con-

sequently that there is no difference between the moral rules which ought to be observed by individuals. (*Lex naturalis dividi potest in naturalem hominum et civitatum, quæ vulgo jus gentium appellatur. Præcepta utriusque eadem sunt—quia civitates semel institutæ induunt proprietates hominum personales.—Imperium* cap. xiv. sect 4). In fact, however, the analogy between nations and individuals is so imperfect, that we are seldom warranted in inferring as to the one, conclusions which have been established as to the other. In the first place, the principal rules of morality among men relate to what have been called imperfect obligations, and direct what is to be done, not what is to be avoided. The negative precept, not to injure, is merged, in the positive precept, to do good. But in the existing state of human improvement, almost all the precepts of international morality are negative. A time may come when it may be useful to inculcate international benevolence; but if we confine our efforts to attainable objects, we must be satisfied for the present with endeavoring to enforce international justice. To suppose that a nation, such as nations now are, unless with a view to enrich a customer, or to strengthen an ally, or to weaken an enemy, or to raise a barrier against a rival, or for some other selfish purpose, will actively strive to increase the power or wealth of another, is a vision in which no practical politician can indulge. Instances may, indeed, be pointed out in which a people, too weak to excite jealousy, has received disinterested assistance. But such instances are very rare. Great must be the progress of civilization, before the most sanguine international moralist can hope to do more than to diminish fraud and violence, to preserve the weak from treachery and oppression, and to prevent the strong from tearing one another to pieces.

A further difference between the morality of nations and the morality of individuals, arises from the necessity imposed on the former of self-protection. An individual is protected by the law. His cottage is not endangered by the palace which arises in its vicinity. There is, therefore, no need for him to take measures to diminish the power of his neighbors. But one of the best established principles of international morality

declares, that, under certain circumstances, it is not only the right, but the duty of the general body of nations to prevent anyone from acquiring a preponderance of force dangerous to all the others.

Again, it is now an admitted doctrine that between individuals a contract obtained by violence is not binding. But all Europe was shocked at the immorality of the statesman who ventured to proclaim that the treaties of 1815 were not binding on France, having been wrung from her when her armies had been defeated and her fortresses captured, and while her capital was in the possession of the enemy. It is for the welfare of society that agreements entered into by an individual while under duress, should be void. On the other hand, the welfare of society requires that engagements entered into by a nation under duress should be held binding; for if they were not, wars would terminate only by the utter subjugation and ruin of the weaker party. If the Allies had believed that their treaties with France were merely waste paper, they must have destroyed her fortresses and partitioned her territory. They ventured to leave her powerful, only because they thought they could rely on her engagements.

And, lastly, there is a marked difference in the force of the sanctions which tend to restrain immorality among men, and those which tend to restrain it among nations. These sanctions are moral or physical. The physical sanction is the fear of injury to person or to property. The moral sanction is the fear of punishment in a future world, or the loss of honor, of reputation, or self-esteem in this. But the attempt to bind nations by mere moral sanctions, is to fetter giants with cobwebs. To the greatest of human restraints, the fear of a hereafter, they are insensible. Again, nations, are not restrained by fear of the loss of honor; for honor, in the sense in which that word is applied to individuals, does not apply to them. Among educated Europeans, these imputations are in men cowardice and falsehood; and in women unchastity. But as a nation cannot be excluded from the society of other nations, a nation cannot lose its honor in the sense in which honor is lost by an individual. Never has the foreign policy of France

been more rapacious, more faithless, or more cruel, than during the reign of Louis XIV. For half a century she habitually maintained a conduct, a single instance of which would have excluded an individual from the society of his equals. At no time was France more admired, and even courted. What are often called injuries to the honor of a nation are injuries to its vanity. The qualities of which nations are most vain, are force and boldness. They know that, so far as they are supposed to possess these qualities, they are themselves unlikely to be injured, and may injure others with impunity. What they most fear, therefore, is betraying timidity, which is an index and cause of weakness. But timidity, which excludes a man from society, makes a nation only the more acceptable. The fear of loss of reputation is, indeed, a restraint; and among the nations that desire to be respected for justice, a considerable one. But such nations are few. Strength and courage—or as it is usually termed spirit—not integrity and moderation, are the qualities for which most nations desire to be admired. If they can succeed in inspiring fear, they are indifferent to hatred. It appears, therefore, that the fear of physical evil, the fear of injury to the persons or to the properties of the members of the community, is the principal restraint on the conduct of nations. As a protection to the weak, of course, it is trifling; and the rights of weak nations, therefore, unless they acquire the advantages of strength by confederacy, are always disregarded by the strong. But when a nation perceives a probability that it will be resisted, and a possibility that it may fail, the check is powerful—more powerful, in most cases than that imposed by the physical sanction on individuals. When an individual proposes to break the municipal law, he expects to escape detection, and he generally knows the amount of evil which, if he be detected, will follow. A nation, on the other hand, never escapes detection, and never can estimate the amount of suffering which it may incur. The law of nations appears at first sight to resemble those of Draco. It seems to have only one punishment for every offence; but that punishment may vary, from a passing inconvenience to

the utmost evil that man can endure from man. It may be confined to a temporary financial and commercial derangement, or it may extend to the destruction of the wealth, the institutions, the independence, the education, and even the religion of the country. The fear of these dangers generally prevents deliberate breaches of international law between great nations.

In the present state of the world, countries of equal, or nearly equal strength are desirous of mutual peace. War has become a far more expensive and far more dangerous game than it was two or even one hundred years ago. Both nations and sovereigns feel that its risks more than balance the chances of gain. While the law to which each party appeals is in its present vague and imperfect state; and while a knowledge of its rules, as far as they may be considered as established, is so little diffused, it is impossible to prevent the frequent recurrence of international disputes and very difficult to adjust them. But as it seldom happens that a nation intentionally violates what it believes to be that law—except, indeed, in the case of a neighbor too weak to resist—it follows that if the rules of international law were full, clear, and well-known, national disputes would be rare and brief. If it be important that municipal law should be clear and well-known, in order to prevent the inconvenience of private litigation, how much more important is it that the rules of international law should be ascertained and studied in order to prevent war between civilized nations. It is an admitted principle in international law, that all nations are to be treated as equal; that all are entitled to similar rights, and to a similar independence, whatever be their power. But hardly a shadow of this equality is to be found in practice. In practice, the treatment which nations receive depends on their force: the strong dictate, the weak submit, and those whose power is nearly balanced, negotiate.

Possibly there is no point on which the Law of Nations as laid down by Grotius, differs more from that which is now recognized, than as to the treatment of criminal refugees. Grotius maintains, that a nation is strictly bound either to

punish or to give them up, but he admits that the injured nation seldom exacts the performance of this duty, except in the cases of persons accused of political offences, or of atrocious crimes. But it is now admitted, first, that no nation can lawfully punish or even try offences committed by foreigners in a foreign territory; and, secondly, that the extradition of criminals for trial or punishment in the country where the crime was committed, is a matter of treaty, and can be required only to the extent and under the circumstances defined by the treaty; and, thirdly, that political offences are precisely those to which no such treaty ought to extend.

It is scarcely necessary to mention that, of all the countries of the world, England has by far the greatest interest in maintaining the independence of her mercantile flag in time of war, and the safety of the property afloat, whether under another flag or her own. England has almost as many merchant vessels trading to every part of the globe as all the other maritime States put together. Her own property *in transitu* on the ocean is enormous. She also carries a very large amount of merchandise for foreign owners. Her colonies are scattered over every part of the globe, and the colonial trade and navigation is carried on, like that of these islands, under the British flag. It is, therefore, of paramount importance to us that in the event of war, whether we are neutrals or belligerents, our commerce should be exposed to as little interruption and peril as possible. The modern policy of England is to maintain, as far as possible, a strict neutrality when war breaks out between foreign States, unless her own rights and interests are concerned or attacked. During the last forty years six wars have occurred in which British neutrality has been successfully maintained—the Franco-Austrian war of 1859, the Mexican war, the American civil war, the Danish war of 1864, the German war of 1866, and the Franco-German war of 1870. In each of these conflicts it would have been competent to the belligerent powers, but for the Declaration of Paris, if they had thought proper, to exercise the ancient belligerent rights,—to arm and commission privateers; to stop and search every British vessel on the seas; to take out of

them any enemy's property found on board; to intercept the service of our mail-packets all over the world in search for prohibited articles and correspondence, and to inflict on us as neutrals an incredible amount of loss and annoyance.

We have reached an epoch in which a spirit of moderation and a sentiment of equity begin in the elevated sphere of politics to prevail over the tendencies of an ancient routine, at once arbitrary and insolent, and over a culpable indifference to the causes that lead to wars and misfortunes. The grand epoch, which places the interests of humanity above those of policy, is the aim towards which every great intelligence turns in times like these with instinctive sympathy. States between which there exists a serious cause of disagreement, before having recourse to arms, should, as far as possible, submit their differences to the friendly offices of neutral powers.

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